IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

77-205

OTTO MARX, JR., JOHN V. SUMMERLIN, JR.,
WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Petitioners,

vs.

THE DINERS' CLUB, INC.,

Respondent.

BRIEF OF RESPONDENT THE DINERS' CLUB, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent respectfully suggests that a Writ of Certiorari in the instant case is neither necessary nor appropriate for the reasons stated below.

Questions Presented

The threshold question is whether the Petition should be considered for review at all, since it brings up for review only one of the two grounds on which the Court of Appeals ordered a new trial.

The remaining question is whether the second ground of the Court of Appeals' decision ordering a new trial because of the improper admission of testimony construing legal obligations under the contract in suit, opining on matters of law, and thereby usurping the role of the District Court to instruct the jury as to the law, presents a federal question or any question of sufficient importance to warrant review by this Court.

Statute Involved

Rule 704 is not involved in the situation at bar, nor did Petitioners raise Rule 704 as an issue in their appeal to the Court of Appeals.*

Statement of the Case

On the last day of a three week jury trial, Petitioners presented a rebuttal witness, one Stanley Friedman, to testify in support of Petitioners' claim for breach of contract, which was pendent to two 10b-5 claims asserted by Petitioners.** One of Petitioners' 10b-5 claims was dismissed at the close of their case; the other was decided against them by the jury. On the contract claim the jury returned a verdict of $533,000.

The Court of Appeals, after careful review of the factually complex 1,600 page Appendix, ordered a new trial on the contract claim based on a) errors in permitting Mr. Friedman to testify as to the law and improperly to construe the parties' legal obligations under the contract (P. 4a-8a), and b) the improper use the District Court permitted to be made of a statistic (P. 9a-10a).* The Petition generally discusses, although mischaracterizes, the first ground of the Court of Appeals' ruling. However, the Petition presents no discussion whatsoever on the statistic, and accordingly does not bring that issue up for review.

Several other valid grounds for a new trial had been presented to the Court but, in view of its decision to order a new trial as described above, the Court did not determine all the additional grounds on the merits.**

In granting a new trial, the Court of Appeals recited the errors committed by the District Court, noting, *inter alia,* that:

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* Rule 704 of the Federal Rules of Evidence ("Rule 704") was never cited by the District Court in support of its ruling on Friedman's testimony, and was cited only in passing by the Court of Appeals, which held it inapplicable (P. 9a). The letter "P", followed by a number, refers to pages in the Petition and its Appendix.

** The salient facts relating to the various claims and counterclaims presented at the trial are set forth in the opinion of the Court of Appeals, appearing at pages 1a-23a in Appendix A to the Petition for Certiorari (P. 1a-23a). At most, 2 days of the three week trial were devoted to the pendent claim for breach of contract. The contract claim had never been pleaded, but was converted by Petitioners into a separate claim only at the trial, after 5 years of litigation.

* A 70 day median for the effectiveness of registration statements filed in 1970 (P. 10a; 22a, n. 19).

** Respondent had urged that it was entitled to a directed verdict because its performance under the contract was excused by Petitioners' failure to perform conditions precedent (P. 18a, n. 3). Respondent had also urged that Friedman was a surprise witness and improper rebuttal witness. Although it didn't reach these issues, the Court of Appeals did note that the timing of Friedman's testimony was a factor which may well have heightened its prejudicial effect (P. 20a, n. 9). The Court of Appeals also took note of the District Court's comment that Petitioners had made out a *prima facie* case through Mr. Friedman (P. 5a), a "rebuttal" witness who had not been listed in the pre-trial order (P. 6a).

(1) "[Mr. Friedman's] testimony construed the contract, as a matter of law, and includes his opinion that the defenses of [Respondent] Diners were unacceptable as a matter of law" (P. 5a);

(2) ". . . witness Friedman's objectionable testimony did *not* concern only the customary practices of a trade or business. Rather he gave his opinion as to the legal standards which he believed to be derived from the contract and which should have governed Diners' conduct." (P. 6a-7a) (Emphasis the Court's).

The law traditionally prohibiting such testimony was summarized by the Court of Appeals as follows:

"It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." (P. 7a).

• • •

"His conclusion that [Respondent] Diners Club had no *legal* excuses for non-performance was based merely on his examination of documents and correspondence, which were equally before the judge and jury. Thus Friedman's opinion testimony was superfluous." (P. 8a) (Emphasis the Court's).

• • •

"It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum." (P. 9a) (Footnote omitted).

Reasons for Denying the Writ

Since the Petition does not seek to challenge the second basis for the Court of Appeals' decision—the use of the 70 day statistic—which alone requires a new trial, there is no reason for this Court to grant certiorari.

As to the issue that is obscurely raised by the Petition,* not only did the Court of Appeals correctly decide that issue, but the bases for its decision do not present an issue which warrants review by this Court.

Rule 704 neither applies to this issue, nor was "emasculated" by the Court of Appeals, as suggested by Petitioners (P. 4). Rule 704 deals with testimony concerning ultimate issues to be decided by the trier of fact; Friedman's testimony expressed his opinion on the law.**

Furthermore, for Rule 704 to apply, the testimony must be "otherwise admissible." Testimony construing legal obligations under a contract has never been held admissible. Moreover, since Petitioners' claim is a pendent claim

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* A comparison of the Petition and the opinion of the Court of Appeals reveals that the Petition fails to deal accurately and clearly with the real bases for the Court of Appeals' decision. The Petition should be denied for that reason alone. Sup. Ct. R. 23 (4).

** Indeed, his testimony on and knowledge of the facts was negligible:

> "Friedman himself conceded that his opinions were based in part on his 'experience and use of the English language.' His conclusion that Diners Club had no *legal* excuses for nonperformance was based merely on his examination of documents and correspondence, which were equally before the judge and jury. Thus Friedman's opinion testimony was superfluous." (P. 8a) (Emphasis the Court's)

for breach of contract under New York law,* the New York parol evidence rule bars such testimony. There is, therefore, no federal question at all for review by this Court, much less one presenting special and important reasons warranting the grant of certiorari (Sup. Ct. R. 19).

Finally, Petitioners' suggestion that the Court of Appeals decision is in "conflict" with decisions from other Circuits "on the same matter" is simply not correct.

I.

The second error found by the Court of Appeals, not brought up for review by the Petition for Certiorari, requires a new trial in any event.

The Court of Appeals found two independent errors warranting a new trial—Friedman's opinion on the law and construction of the contract (P. 4a-8a), and the improper use of the 70 day statistic (P. 9a-10a):

> "In the frame within which it was used, however, the statistic, though relevant, became an item of prejudicial overweight. See Federal Rule of Evidence 403." (P. 10a) (Footnote omitted).

The Petition is silent with respect to the Court of Appeals' ruling on this latter issue, thus conceding its correctness. Since that ruling is not brought up for review, Sup. Ct. R. 23 (1) (c); *F.D. Rich Co.* v. *United States,* 417 U.S. 116, 121 n. 6 (1974), and since a new trial is required because of that ruling, there is no reason for this Court to grant certiorari to review the other basis for a new trial. *See, Andrews* v. *Louisville & Nashville R. Co.,* 406

* P. 43a.

U.S. 320, 324-25 (1972); *Namet* v. *United States,* 373 U.S. 179, 190 (1963). *Cf. Local No. 8-6* v. *Missouri,* 361 U.S. 363 (1960).

Moreover, even if there were only one ground for a new trial which was brought up for review, it would be inappropriate for certiorari to be granted, since no final judgment has yet been entered because of the new trial. *See, Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R. Co.,* 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916).

II.

The Court of Appeals' ruling that it was error to permit Mr. Friedman to construe the contract and testify as to the law was correct, and is not at odds with Rule 704, which does not apply to this case.

A. The Court of Appeals' Decision was Correct

The black letter law, too well established to admit of dispute, is that the judge, and not a witness, should instruct the jury on what the law is; that "'you cannot ask a witness what is the meaning of a written document.'" (P. 21a, n. 13 quoting from *Kirkland* v. *Nisbet,* 3 Marcq. Sc. App. C 766 (1859)), and that "[i]t is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum." (P. 9a). The Petition is silent on the reasoning of the Court of Appeals, and wholly fails to come to grips with the fundamental issues that the Court of Appeals in fact decided. For that reason alone, the Petition should be denied. *See,* Sup. Ct. R. 23(4). *Cf. Belcher* v. *Stengel,* 429 U.S. 118 (1976).

The Court of Appeals cited ample precedent in support of its ruling (See, P. 6a-9a), and no authority to the contrary has ever been cited. As the Court of Appeals noted, no witness, expert or otherwise, may construe a contract or offer his opinion on the legal obligations of parties under a contract (*Id.*).* To do so usurps the function of the trial judge. As a commentator has stated on the subject:

> "A witness cannot be allowed to give an opinion on a question of law, and this upon considerations quite different from the supposed objection to opinions on ultimate facts. . . . There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge. This may rest upon a legal fiction, but one more vital to the system and no more contrived than, say, the presumption of innocence. To allow anyone other than the judge to state the law would violate the basic concept. Reducing the proposition to a more practical level, it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently." Stoebuck, *Opinions on Ultimate Facts: Status, Trends, And A Note of Caution,* 41 Denver L.C.J. 226, 237 (1964) (Footnote omitted).

* The prejudicial impact of such testimony is particularly severe when the witness' stature is elevated in the eyes of the jury by the labels of lawyer and expert.

B. Rule 704 is Inapplicable

Rule 704, an afterthought of Petitioners,* has nothing to do with testimony that purports to instruct the jury on the law of the forum or to construe a contract. The Court of Appeals squarely resolved the distinction between testimony as to ultimate facts and testimony on the law, holding that:

> "The applicable law, not being foreign law, *could, in no sense, be a question of fact to be decided by the jury.*" (P. 9a) (Emphasis added)
>
> • • •
>
> "Recognizing that an expert may testify to an ultimate fact, . . . we think care must be taken lest, in the field of securities law, he be allowed to usurp the function of the judge." (P. 11a).

See also Huff v. *United States,* 273 F.2d 56, 61 (5th Cir. 1959). (cited at P. 22a, n. 20).

Moreover, to be permissible under Rule 704, testimony must, as the Court of Appeals pointed out, be "otherwise admissible" (P. 9a), which Friedman's testimony clearly is not. As the Advisory Committee noted, Rule 704 "does not lower the bars so as to admit all opinions," and Rules 701, 702 and 403 function to bar

> "opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, 'Did T have capacity to make a will?' would

* Rule 704 heretofore was not of sufficient significance to warrant an appearance in Petitioners' Brief to the Court of Appeals.

be excluded . . ." Notes of Advisory Committee on Proposed Rules of Evidence, 51 F.R.D. 315, 405-06 (1971).*

Friedman's testimony was not "otherwise admissible" for yet another reason. Under the law of New York, which applies to this pendent claim, *Smith* v. *Bear,* 237 F.2d 79 (2d Cir. 1956), parol evidence, such as the testimony of Mr. Friedman, which purports to vary the terms of a written contract, is not admissible. *Leumi-Financial Corp.* v. *Richter,* 17 N.Y.2d 166, 269 N.Y.S.2d 409, 216 N.E.2d 579 (1966). Thus, this case does not present any federal issue, much less one of sufficient importance to warrant the grant of certiorari. *See, e.g., Wolf* v. *Weinstein,* 372 U.S. 633, 636 (1963).

Petitioners' reliance upon *United States* v. *Cohen,* 518 F.2d 727 (2d Cir.), *cert. denied,* 423 U.S. 926 (1975) and *Republic Technology Fund, Inc.* v. *Lionel Corporation,* 345 F. Supp. 656 (S.D.N.Y. 1972), *rev'd in part,* 483 F.2d 540 (2d Cir. 1973), *cert. denied,* 415 U.S. 918 (1974), both decided by the Second Circuit, is wholly misplaced. Both of these cases were discussed and correctly distinguished by the Court of Appeals in the decision below (P. 6a; 11a; 20a, n. 10, n. 12; 23a, n. 21).

The Petition does not fairly summarize what it was about Mr. Friedman's testimony that the Court of Appeals found to be in error, but instead mischaracterizes the thrust of Friedman's testimony so as to attempt to fit it within Rule 704. The Court of Appeals acknowledged that Mr. Friedman,

> "qualified as an expert in securities regulation, . . . was competent to explain to the jury the step-by-

* The Court of Appeals itself quoted this portion of the Advisory Committee Note. (P. 22a, n. 17).

> step practices ordinarily followed by lawyers and corporations in shepherding a registration statement through SEC." (P. 6a).

The Court of Appeals went on to say, however, that:

> "In the case at bar, however, witness Friedman's objectionable testimony did *not* concern only the customary practices of a trade or business. Rather, he gave his opinion as to the legal standards which he believed to be derived from the contract and which should have governed Diners' conduct." (Emphasis the Court's) (P. 6a-7a).

Petitioners completely miss the import of the Court of Appeals' decision when they suggest that Rule 704 was "emasculated" (P. 4). Rule 704 has nothing to do with testimony on the *law,* which was the error found by the Second Circuit in Friedman's testimony. Rule 704 deals with "ultimate issue" testimony, which the Second Circuit Court of Appeals has long permitted, well *before* the adoption of Rule 704. *See, e.g., Carlson* v. *Chisholm-Moore Hoist Corp.,* 281 F.2d 766, 772 (2d Cir.), *cert. denied,* 364 U.S. 883 (1960); *United States* v. *Fernandez,* 480 F.2d 726, 740 (2d Cir. 1973) (citing the then unadopted Rule 704). The decision below does not change Rule 704 or the prior decisions of the Second Circuit on ultimate issue testimony, but merely reaffirms the fundamental rule barring testimony by a witness on the law.

III.

The opinion below is not in conflict with decisions of other Courts of Appeal on the same matter.

By mischaracterizing both the opinions of various Circuit Courts and the opinion below, Petitioners have attempted to mislead this Court into perceiving a conflict among the Circuits where none exists. The cases cited by Petitioners are both factually distinguishable from the instant case, and did not involve Rule 704, except by way of dicta.

In *United States* v. *McCoy,* 539 F.2d 1050 (5th Cir. 1976) (P. 9), the court held there was no abuse of discretion in allowing the expert to draw "inferences from the facts which a jury would not be competent to draw" 539 F.2d at 1063. Such holding is totally in accord with that of the Court below which rejected Friedman's testimony because, *inter alia,* it related to conclusions which the jury was equally competent to draw (P. 8a). Moreover, it is clear that the application of Rule 704 was not even in issue in *McCoy* except as a matter of dictum in accord with the decision below. 539 F.2d at 1063.

In *Arcement* v. *Southern Pacific Transportation Co.,* 517 F.2d 729 (5th Cir. 1975) (P. 10), the Fifth Circuit affirmed the Trial Court's exclusion of certain testimony (far different from Friedman's), but stated in dictum that under Rule 704 an opinion on an ultimate issue would be generally admissible, a statement totally in accord with that of the Court below.

In *Johnson* v. *Husky Industries, Inc.,* 536 F.2d 645 (6th Cir. 1976), a case not involving Rule 704, the Court allowed certain testimony since, "in the context in which it was given", it was "sufficiently related to the areas of his expertise as to be a permissible extension thereof" 536 F.2d

at 649-50. In the instant case the Court, while recognizing the discretion of the trial judge, ruled that Friedman's testimony concerned "matters outside his area of expertise" (P. 7a), and that, in any event, testimony as to matters of law can never be the subject of expert testimony (P. 6a-9a).

Petitioners' reliance on *United Telecommunications, Inc.* v. *American Television and Communications Corp.,* 536 F. 2d 1310 (10th Cir. 1976) is similarly misplaced. While that case did not involve Rule 704, but rather Colorado law, the result reached, and that Court's reasoning, are very much in accord with the decision below. The Court there upheld the exclusion of expert testimony which was superfluous:

> ". . . Mr. Wheat's definition of 'best efforts' . . . was not substantially different from the common meaning of the words. His testimony would not have contributed any specific facts or conclusions to aid the jury in determining whether the covenant was breached." 536 F.2d at 1318.

The cases cited by Petitioners thus cannot provide the basis for a claim of conflict among the circuits. Those cases involve different factual circumstances. Moreover, none of them held that a witness can testify on the law. There is thus no conflict.

Conclusion

For the reasons stated above it is respectfully submitted that the Petition For a Writ of Certiorari should be denied in all respects, and that the case should proceed to a new trial, as ordered by the Court of Appeals.

Respectfully submitted,

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